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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)

)
Amendment of Rules Governing)
Procedures To Be Followed When)
Formal Complaints Are Filed)
Against Common Carriers)

CC Docket No. 92-26

COMMENTS OF UNITED VIDEO, INC., SUPERSTAR CONNECTION,
SOUTHERN SATELLITE SYSTEMS, INC., NETLINK USA AND
EASTERN MICROWAVE, INC. IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

Summary	ii
Introduction	2
I. Pleading Procedures Other Than Discovery	3
A. Answers And Pre-Answer Motions	4
B. Replies To Answers	6
C. Subsequent Motions For Summary Judgment Or Motions To Dismiss	6
D. Substantive Motions, Briefs And Replies	7
II. Discovery Procedures	9
A. Initiation Of Discovery	10
B. Document Production And Other Discovery Initiatives	10
C. Bifurcation Of Discovery Concerning Threshold Issues And Damages	11
D. Relevance Objections	13
E. Filing Requirements And Confidentiality	16
III. Sanctions For Redundant Or Frivolous Motions	16
Conclusion	18

SUMMARY

United Video, Inc. ("United Video"), Superstar Connection ("Superstar"), Southern Satellite Systems, Inc. ("Southern"), Netlink USA ("Netlink") and Eastern Microwave, Inc. ("EMI") (collectively, the "Joint Commenters"), support the Commission's goal of streamlining its formal complaint procedures. However, the Commission must retain sufficient flexibility in its procedures to permit development of an adequate record upon which to base its decisions.

The Commission should strictly enforce its requirements concerning the contents of formal complaints and answers and should prohibit replies to answers. The time period for filing an answer cannot be further shortened without adversely affecting the rights of defendants, and motions to dismiss or motions for a more definite statement of the complaint should be permitted prior to answer, thereby deferring the answer. The Commission should not restrict motions for summary judgment which may dispose of the action or focus the issues for any remaining discovery. Oppositions should be limited to matters raised in the initial motion and responsive affirmative defenses with replies permitted but similarly limited to matters raised in oppositions. The time period and page limits for briefs ordered by the Commission, as well as oppositions and replies, are best determined on an ad hoc basis depending upon the complexity of the issues involved.

Discovery should not commence until after an answer is filed and should be limited to thirty self-executing interrogatories in all but extraordinary circumstances. Discovery responses should not be filed with the Commission, and the Commission should adopt a broader confidentiality rule prohibiting the use of proprietary information obtained in discovery for any purpose other than resolution of the formal complaint. Rather than eliminating relevance objections, the Commission should draw from federal and local court rules requiring parties to meet and confer to resolve discovery disputes. It should also adopt rules permitting sanctions against the losing party when no agreement is reached and a motion to compel is decided.

The Commission's proposal to bifurcate discovery should be expanded to require resolution of threshold issues, such as the regulatory status of defendants and the Commission's jurisdiction to adjudicate the complaint, before permitting discovery on liability and damages. Finally, the Commission should adopt a rule similar to Fed. R. Civ. P. 11 to provide for sanctions against parties and attorneys who abuse the formal complaint process by filing frivolous complaints and/or motions or interposing meritless discovery objections.

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NOTICE OF PROPOSED RULEMAKING

United Video, Inc. ("United Video"), Superstar Connection ("Superstar"), Southern Satellite Systems, Inc. ("Southern"), Netlink USA ("Netlink") and Eastern Microwave, Inc. ("EMI") (collectively, "Joint Commenters"), by their attorneys, hereby submit their comments in response to the Notice of Proposed Rulemaking, FCC 92-58, released March 12, 1992 ("Notice"), concerning procedures for resolving formal complaints against common carriers under 47 U.S.C. §201, et seq.

The Joint Commenters fully support the Commission's objectives of simplifying and expediting the formal complaint process and reducing the incentive for parties to abuse the discovery process. See Notice at ¶¶7, 18. However, the Joint Commenters urge the Commission to adopt measures which allow parties sufficient time and flexible procedural alternatives to address disputed factual and legal issues and to create

an adequate record upon which the Commission can render a reasoned judgment.

Introduction

The Joint Commenters provide superstation and network station transmission service via satellite to cable television, SMATV and MMDS systems throughout the United States. They also distribute programming to individual home satellite dish ("HSD") subscribers and/or to HSD owners who may subscribe through program package "distributors" such as the National Rural Telecommunications Cooperative ("NRTC"). These comments follow a complex, protracted formal complaint proceeding in which NRTC alleged that United Video, Southern and Netlink (the "Defendants") had engaged in discriminatory practices in violation of 47 U.S.C. §202 with respect to the services which they rendered to NRTC.

The complexity of the NRTC proceeding necessitated motions for a more definite statement of the complaint, amended complaints, extensive discovery requests and responses, several Commission status conferences, confidential treatment of proprietary information pursuant to a protective order and the introduction of extensive expert economic and technical testimony. The Commission also bifurcated the proceeding so that discovery of cost and rate information and of the Complainant's alleged damages was deferred pending resolution of certain threshold issues, including the Commission's

jurisdiction to resolve the matter, the regulatory status and obligations of the Defendants, and whether certain services provided by the Defendants were "like" services for purposes of Section 202. After completing discovery on these issues and the filing of dispositive motions by the Defendants, NRTC moved to dismiss its complaint voluntarily for lack of jurisdiction, acknowledging that Defendants did not provide services to NRTC as common carriers.¹ Based on this recent and extensive experience, the Joint Commenters offer the following observations concerning the Commission's proposals to reform the formal complaint process.

I. Pleading Procedures Other Than Discovery

At the outset, the Commission proposes to expedite the formal complaint process "by modifying filing deadlines [and] eliminating apparently unnecessary pleading opportunities." Notice at ¶7. The Joint Commenters support elimination of unnecessary pleadings such as the Complainant's right to reply to the answer and the Commission's proposal to limit opposition pleadings to issues raised by the motion to which they respond. However, the Joint Commenters urge the Commission not to change the time for filing an answer, to maintain flexibility in the timing of dispositive motions, to preserve

¹ The Commission has not yet acted on NRTC's motions to dismiss. NRTC's original formal complaints were filed on January 16, 1991.

a movant's right to reply to an opposition, and to take into account the complexity of the matters at issue in setting briefing deadlines and page limitations.

A. Answers And Pre-Answer Motions

The Commission has proposed to reduce the time to answer a complaint from thirty to twenty days (Notice at ¶8) and to defer the filing of any pre-answer motions until the time an answer is due. Notice at ¶11.² These rule revisions are counterproductive. Except in the most simplistic proceedings, the twenty-day time frame is inadequate for a defendant to retain counsel, examine the factual allegations and applicable precedent, and prepare a thorough answer to a formal complaint. Under federal court "notice pleading" practice, complaints often are not as detailed and complex as those filed pursuant to Section 1.721 and may not require the same time and effort to answer. Even in federal court, time periods for filing answers in extremely complex cases are often routinely extended.

This reduced time for an answer becomes even more burdensome in light of the Commission's further proposal to

² The only exception to this proposed rule is a complainant's motion for dismissal before an answer is filed. However, the proposal requires that a defendant's motion for a more definite statement of the complaint be filed with the answer and that its motions for dismissal or summary judgment be filed at the same time "unless it is based on information discovered after the deadline for filing the answer." Id.

prohibit the filing of motions until the time an answer is due. If a complaint fails to state a claim or lacks the required specificity, or if the Commission lacks jurisdiction over a complaint, a defendant should not be forced to file an answer. To require a defendant to answer a legally insufficient complaint and contemporaneously file an appropriate motion to dismiss or motion for summary judgment³ unnecessarily wastes a defendant's time and resources.

Likewise, the Commission should retain Section 1.727(b) in its present form, permitting a motion that the complaint be made more definite and certain prior to the filing of the answer. The Notice appears to assume that any vagueness in complaints will be narrowly confined to limited paragraphs which will be the subject of a motion for a more definite statement, and that the remaining paragraphs may be answered. Notice at ¶11. The Joint Commenters' experience is to the contrary. A complaint can be so permeated by vagueness that any meaningful answer is effectively impossible. Seeking a more definite and certain complaint before filing an answer need not cause substantial delay and may help frame the issues at stake. Thus, the present two-step process may actually expedite the proceeding by requiring an early refinement of

³ A motion for summary judgment requires a thorough briefing of one or more dispositive issues and may require expert testimony. It is not feasible to require preparation of the motion contemporaneously with an answer.

the issues, eliminating the need to file an amended answer later in the proceeding.

B. Replies To Answers

The Joint Commenters support the Commission's proposal to limit the filing of replies to answers. The complaint/answer process is designed primarily to frame the issues in a proceeding and, as the Commission has noted, that process generally is complete after an answer is filed.

C. Subsequent Motions For Summary Judgment Or Motions To Dismiss

The Joint Commenters oppose the Commission's proposal to prohibit or severely limit the filing of motions to dismiss or for summary judgment after the filing of an answer. Notice at ¶11. Under the Commission's proposal, it is entirely possible that a defendant will have to prepare and file simultaneously an answer, a motion for more definite and certain statement and a motion to dismiss or motion for summary judgment, all within twenty days after being served with a complex complaint. Twenty days, or even thirty days, is simply insufficient time to answer and move to dismiss or for summary judgment against a complaint of any complexity.

Moreover, a motion for summary judgment filed during the course of discovery may narrow the remaining issues for discovery or eliminate the need for further discovery altogether. In the NRTC proceeding, for example, motions for

judgment filed by the Defendants helped to focus the remaining discovery on dispositive issues, provided the vehicle for expert testimony concerning those issues without the need for depositions, and served as the primary catalyst for bringing the proceeding to an end. Thus, the Commission's proposal to prohibit post-answer motions for summary judgment unless the motion "is based upon information discovered after the deadline for filing the answer" would eliminate a useful tool in cases where there simply is insufficient time to obtain the necessary affidavits and expert testimony prior to filing the answer. By effectively eliminating such motions, the Commission would prevent early resolution of a proceeding to the prejudice of respondents.

D. Substantive Motions, Briefs And Replies

The Joint Commenters endorse the Commission's proposal to state more explicitly that oppositions to motions may address only those issues (and related affirmative defenses) raised by the motion. Notice at ¶11. This should focus and streamline the proceeding without sacrificing any party's opportunity to be heard.

However, the Joint Commenters object to the proposal to prohibit a reply on motions and on briefs where discovery has not been conducted. Notice at ¶¶9, 11. Contrary to the Commission's assertions in Paragraph 11 of the Notice, this is not analogous to eliminating replies to answers. As noted

above, the complaint/answer process is designed to frame the issues between the two parties and does not require a third stage. However, on motions, the movant has the burden of proof and should be entitled to address any issues purportedly raised in an opposition.

A reply generally should aid the Commission's consideration of the issues, without delaying the proceeding. For example, if a defendant files a motion for summary judgment and the complainant asserts that there is a fact in dispute, it is important to permit the defendant a brief opportunity in reply to show that the fact is not in dispute or is not material. In addition, an opposition may include affidavits which ought to be subject to critical review and rebuttal by the opponent, particularly when no discovery has been conducted. Even where the Commission orders the filing of briefs simultaneously by the parties, one round of replies is essential to narrow the issues, test the factual and legal claims of the parties and perform some of the initial spadework upon which the Commission must rely as it critically evaluates the parties' arguments.

The Commission's proposal to limit briefs (where no discovery has been conducted) to 25 pages and generally to require submission of briefs within fifteen days of the Commission's order requesting such briefs may also present a problem. Notice at ¶9. In some cases, these parameters will

be sufficient. However, the Commission has not placed any limits on the length of the complaint, or its complexity, or the number of allegations and issues it raises. Consequently, there may be instances in which fifteen days and 25 pages will be inadequate to address the necessary issues raised in the complaint. The Joint Commenters recommend that the Commission continue to follow a flexible approach, making these judgments on an ad hoc basis as appropriate.⁴

II. Discovery Procedures

The Joint Commenters generally support the Commission's efforts "to minimize unnecessary delay caused by protracted discovery" and to limit abuse of the discovery process. Notice at ¶13. Deferring discovery until after an answer is filed, bifurcating discovery concerning certain threshold issues, liability and damages, and adopting confidentiality rules will help to reduce the incidence and scope of discovery disputes. However, absent modification, other discovery proposals advanced by the Commission may encourage gamesmanship and abuse of the discovery process, wasting the resources of the Commission and the parties.

⁴ An alternative approach would involve simplified "fast track" rules for resolving certain types of complaints with which the Commission has had substantial experience and more detailed procedural provisions for complex cases.

A. Initiation Of Discovery

At the outset, the Commission can reduce the incidence and scope of discovery disputes by policing effectively its requirements with respect to complaints and answers. By insisting that complaints clearly state the law or policy allegedly violated (with proper citations) and allege specific facts which, if proven, would establish the alleged violation -- and that answers provide equally specific and responsive legal and factual information -- the Commission can narrow the areas of relevant factual dispute requiring further exploration in discovery. Because a properly pleaded complaint and answer can substantially narrow the issues for discovery, the Joint Commenters support the Commission's proposal to defer initiation of discovery through self-executing interrogatories until after an answer is filed.

B. Document Production And Other Discovery Initiatives

The Joint Commenters oppose the Commission's proposal to require "requests for production of documents or other discovery initiatives" to be filed within the "same time frame" allotted for the filing of self-executing interrogatories under proposed rule section 1.729. Notice at ¶14. This requirement would force parties to file broad requests for production of documents and motions for depositions without the opportunity to review their opponents' interrogatory

answers. Consequently, the Commission would be required to review and rule on multiple discovery motions, the need for which may be obviated by the respondents' interrogatory answers or by subsequent agreement of the parties regarding further discovery. The current procedures, which require parties to justify the need for further discovery after reviewing interrogatory responses, are more time-efficient and better conserve the resources of the Commission and the parties. The Commission should strictly enforce the current rule prohibiting discovery beyond the thirty self-executing interrogatories permitted under Section 1.729 absent "good cause" (47 C.F.R. §1.730), which should be interpreted to require a statement of the additional discovery sought and a demonstration that the moving party will be unduly prejudiced without it.

C. Bifurcation Of Discovery Concerning
Threshold Issues And Damages

The Joint Commenters generally support the Commission's proposal to bifurcate discovery so that "no discovery regarding alleged damages [would] be permitted until after an initial finding of liability by the Commission." Notice at ¶13. The Joint Commenters believe that such an approach will result in substantial benefits for the parties and the Commission and urge the Commission to expand this approach to further focus and streamline the litigation process.

In the NRTC proceeding referenced previously, United Video filed a formal Motion to Bifurcate the Proceedings, requesting that the Commission designate only certain threshold legal issues for review in the initial phase and defer discovery on complex cost and rate issues -- not just damage issues -- to a later phase pending determination of the preliminary legal issues.⁵ Bifurcation thus enabled the preliminary determination of fundamental legal issues, including the Commission's jurisdiction and the legal status of the Defendants, which ultimately negated the requirement for discovery and decision not only on damages but also on cost and rate issues as well.

Bifurcation of fundamental legal issues, in addition to issues relating to liability, will expedite the Commission's analysis and final decision and significantly conserve the parties' resources.⁶ For example, threshold issues regarding a defendant's regulatory status and the Commission's jurisdiction under Title II should be addressed and resolved at the outset. The Commission should adopt measures to

⁵ United Video's Motion to Bifurcate Proceedings was granted by the Commission on November 15, 1991.

⁶ However, in cases where the Commission defers discovery on damages issues, it nevertheless should continue to require complainants to set forth in their complaints specific damage allegations, including the means by which the alleged damages were calculated. This information is important to facilitate settlement, either before commencement of discovery or after a finding of liability by the Commission.

provide for limited discovery and prompt resolution of these threshold issues before permitting substantive discovery on liability and/or damages issues. Issues designated for a later phase of the proceeding may actually become moot or irrelevant to the conclusions reached in a proceeding. Indeed, the Commission has bifurcated proceedings in the past where no irreparable harm will result to the parties.⁷

The Joint Commenters also support the Commission's proposal to establish a limited period during which parties may discuss settlement or alternative dispute resolution following a Commission finding of liability. As noted by the Commission, litigation of the damages issues in a bifurcated proceeding "could result in the expenditure of considerable additional time and resources of the parties and the staff." Notice at ¶13. To the extent that parties may avoid unnecessary litigation expense through negotiation, both the parties and the Commission will benefit.

D. Relevance Objections

The Joint Commenters oppose the Commission's proposal "to preclude objections to discovery based on relevance." Notice at ¶15. Under the Commission's proposal, any "refusal to answer an interrogatory or an objection based on relevance would be deemed an admission of allegations con-

⁷ Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 5384, 5386 (1989).

tained in the interrogatory." Id. While the Commission's proposal is intended to reduce discovery disputes, it would encourage abuse of the discovery process and effectively increase motions practice.

Interrogatories should seek information rather than substitute for requests for admission. By eliminating relevance objections, the Commission will simply encourage parties to craft the broadest possible contention-type interrogatories in the hope of obtaining a dispositive admission by default. The Commission's proposal would encourage wide-ranging interrogatories to which parties could not object for fear of admitting the "facts" contained in the interrogatory, thereby undermining the effectiveness of bifurcation and other measures designed to expedite discovery and limit abuse of the discovery process.⁸ Thus, the Commission's proposal potentially penalizes the respondent for refusing to answer an interrogatory which is clearly irrelevant or overly broad and rewards the party propounding the improper interrogatory.

The Joint Commenters respectfully submit that a modified version of Fed. R. Civ. P. 37(a)(4) would substantially reduce the incidence of unwarranted relevance objec-

⁸ Federal courts have long recognized that "discovery, like all matters of procedure, has ultimate and necessary boundaries." Hickman v. Taylor, 329 U.S. 495, 507 (1947). Relevance has provided a critical boundary of discovery, thereby limiting the potential for abuse. See, e.g., Jones v. Metzger Dairies, Inc., 334 F.2d 919, 925 (5th Cir. 1964).

tions while at the same time eliminating the incentive to propound overreaching contention-type interrogatories in the hopes of obtaining admissions under the Commission's proposal. Under that Rule, the party or attorney "whose conduct necessitated" the filing of a motion to compel pays the "reasonable expenses" and "attorney fees" to the prevailing party unless the court finds that the losing party's position "was substantially justified." Thus, in any instance in which the parties are unable to resolve a relevance objection by agreement,⁹ the losing party on a motion to compel should pay the costs and reasonable attorney fees of the prevailing party in bringing or responding to the motion. In addition to deterring overly broad interrogatories and insupportable relevance objections, this proposal would encourage resolution of discovery disputes by agreement rather than by expending Commission resources to resolve motions to compel.

⁹ Fed. R. Civ. P. 26(f) requires attorneys to make "reasonable effort to reach agreement" on discovery before scheduling a discovery conference with the Court. Fed. R. Civ. P. 37(g) requires attorneys to "participate in good faith in the framing of a discovery plan by agreement" and provides for payment of attorney fees and costs where a party fails to do so. Rule 37(a) of the Superior Court of the District of Columbia goes one step further and requires the parties "to meet for a reasonable period of time" to attempt to resolve discovery disputes before bringing a motion to compel. The Commission should combine these rules to require the parties to meet to attempt to resolve discovery disputes by agreement.

E. Filing Requirements And Confidentiality

The Joint Commenters support the Commission's proposals to: (a) eliminate the filing of discovery responses with the Commission; (b) require parties to file two versions of any brief or other papers containing confidential information; and (c) adopt a confidentiality rule for filings containing proprietary business information. Notice at ¶¶16-17. However, additional provisions should be included in the confidentiality rule to prohibit parties receiving confidential information from using that information for any purpose other than the formal complaint proceeding. Thus, confidential information could not be used by the receiving party to further its competitive business activities, to lobby Congress, or to initiate rulemaking proceedings at the Commission. Finally, the confidentiality rule should prohibit parties receiving proprietary information from including that information in the publicly available version of any filing in the complaint proceeding and provide for removal of any such information erroneously included by an opposing party.

III. Sanctions For Redundant Or Frivolous Motions

The Commission's proposed rule revisions are intended to expedite the formal complaint process by eliminating redundant pleadings and curbing the proliferation of motions of minimal significance. Notice at ¶¶7, 11. Laudable and necessary as this goal is, the appropriate remedy

is not to restrict the filing of certain motions but to sanction parties and/or their counsel who create problems by bottlenecking proceedings with boundless discovery requests and motions or objections which are inappropriate or unjustified. While the Commission has indicated its preference not to model its rules precisely upon the Federal Rules of Civil Procedure (Notice at n.3), the implementation of sanctions as adopted by the Federal Rules seems well-placed. Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part that an attorney's signature certifies that, "after reasonable inquiry," the pleading is:

well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose....

Fed. R. Civ. P. 11.¹⁰ Rule 11 provides for an objective standard in evaluating the reasonableness of an attorney's conduct and mandates the imposition of sanctions if the Rule is violated. The Rule does not prohibit merely intentional misconduct. Inexperience, incompetence, willfulness or deliberate choice may all contribute to a violation. Moreover, the purposes of Rule 11 include not only compensating the victims of the Rule 11 violation but also punishing

¹⁰ See also D.C. Code of Professional Responsibility DR 7-102(A) (1983); D.C. Rules of Professional Conduct Rules 3.1, 3.3 (1990).

litigation abuse, streamlining court dockets and facilitating court management.¹¹

The potential for sanctions would discourage useless requests and motions while allowing the Commission (and the parties) the opportunity to develop fully and flexibly a record in their proceeding. This important end in the development of the litigation should not be short-circuited by those who disregard the Commission's processes. Thus, rather than curtailing the process by eliminating or severely limiting certain motions, the Commission should provide for sanctions against those who abuse the process by filing frivolous or redundant motions.

Conclusion

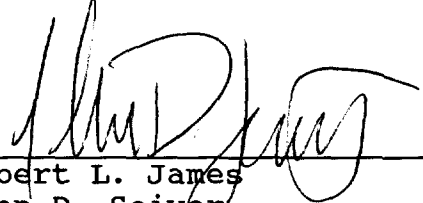
The Commission's proposals to eliminate certain unnecessary pleadings and to bifurcate discovery will further its goal of expediting the formal complaint process. However, other Commission proposals may encourage further abuse of that process or severely limit the ability of the parties to develop an adequate record for decision. Rather than eliminating or limiting procedures which, when used properly, can facilitate resolution of formal complaint proceedings,

¹¹ See In re Kunstler, 914 F.2d 505, 522-523 (4th Cir. 1990), cert. denied, 111 S. Ct. 1607 (1991). Likewise, imposition of discovery sanctions similar to those enumerated in Fed. R. Civ. P. 37 would deter abusive objections or evasive answers and unnecessary motions to compel. See supra at 14-16.

the Commission should adopt measures to sanction parties and attorneys who abuse those procedures.

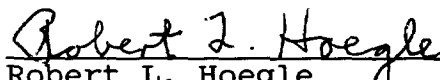
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Respectfully submitted,



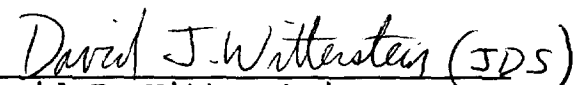
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